DADDY DEL's L.L.C.

IBLA 98-423 Decided December 15, 1999

Appeal from a decision of the Idaho State Office, Bureau of Land Management, declaring mining claim null and void ab initio. IMC-40174.

Affirmed.

1. Mining Claims: Powersite Lands--Mining Claims: Relocation--Mining Claims: Withdrawn Land--Powersite Lands--Withdrawals and Reservations: Powersites

   A mining claim located prior to Aug. 11, 1955, on land subject to a powersite classification is null and void ab initio, and an attempt to amend the location is an action that has no legal effect.

2. Mining Claims: Relocation--Words and Phrases

   Where a mining claim is null and void ab initio, an amended notice of location will not be construed as a relocation where the filing does not conform to state and Federal requirements for a new location.

APPEARANCES: Delton I. (Buzz) Davis, Boise, Idaho, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Delton I. (Buzz) Davis (Davis) appeals on behalf of Daddy Del's L.L.C. from a July 17, 1998, decision of the Idaho State Office, Bureau of Land Management (BLM), declaring the Minnie Gail unpatented mining claim (IMC-40174) null and void ab initio. Davis also requests a stay of the decision.

Facts

On August 18, 1937, W.E. Beach and G.H. Smith prepared a Placer Mine Location Notice for the Minnie Gail placer claim. The 1937 Notice describes the mining claim as containing 40 acres. As best we can read

the legal description, the Notice describes the location as beginning at a discovery monument in "Yellow Pine Mining District, in the County of Valley and State of Idaho," and:

> Commencing at this discovery monument, which is the [sic] 600 ft to corner of the claim, thence in a North westerly direction [to] corner No. 1, the N.W. corner of the claim; thence in a Southerly direction 1320 feet to corner monument No. 2, the S.W. corner of the claim; thence in a S. Easterly direction 1320 feet to corner monument No. 3, the S.E. corner of the claim; thence in a Northerly direction 1320 feet to corner monument No. 4, the N. E. corner monument of the claim; thence in a North Westerly direction 720 feet to the place of beginning. The said monument upon which this notice is posted, is situated about 50 feet in a Westerly direction from East Fork of the South Fork of the Salmon River and about 700 ft from the mouth of said stream[.]

This Notice was recorded on September 11, 1937, in Valley County records.

The record indicates that no later than 1979, Bonnie and Delton Davis (the Davises) began to make filings with respect to the Minnie Gail placer claim. On October 22, 1979, seeking to meet the requirements of section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1994), the Davises filed a letter which recorded the claim with BLM. According to the letter:

> We filed our claims at the Valley County Court House in Cascade this year as every year for the past several years. [T]he claims are located in Valley County on the South Fork of the Salmon River. The names of the seven group [sic] of claims are * * * Minnie Gail * * *. We intend to hold these claims and hope this is the information you need. These claims are recorded in the Valley County Court House under the above names.

BLM assigned serial number IMC 40174 to the Minnie Gail claim. The record shows that the Davises submitted annual affidavits of assessment work required to be submitted under FLPMA after that date.

On June 14, 1991, Bonnie Davis filed with the BLM Idaho State Office a document entitled "Additional and Amended Placer Location Notice" (Additional and Amended Notice). The document relates the dates of discovery and location as August 16 and 18, 1937, and, at the same time, states that, as of June 1, 1991, the claimant "does amend, locate and claim, by rite of the original discovery, location, primal appropriation and possession," the Minnie Gail mining claim. The Additional and Amended Notice states that it is prepared, inter alia, "for the purpose of correcting any errors in the original location, description or record, and of more definitely describing the situation and boundaries of said placer mining claim." The Notice

describes the location of the mining claim as: E½NW¼SW¼ and the W½NE¼SW¼, sec. 3, T. 19 N., R. 6 E., Boise Meridian, Valley County, Idaho. In addition to filing this document with BLM, the Davises recorded it with Valley County as instrument number 180756 on June 11, 1991.

On August 5, 1997, Bonnie Davis deeded all of her interest in the Minnie Gail mining claim to Delton (Buzz) I. Davis. On April 22, 1998, Buzz Davis transferred by Quitclaim Deed and Assignment all interest in the Minnie Gail placer claim to "Daddy Del's, L.L.C., an Idaho limited liability company," of 5115 Umatilla Avenue, Boise, Idaho.

On July 17, 1998, BLM issued a decision declaring the Minnie Gail placer mining claim (IMC 40174) null and void ab initio. BLM noted that the lands encompassed by the mining claim "lie entirely within Power-Site Classification No. 280, which was established on December 19, 1933, under the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063)." (Decision at 1.) BLM acknowledged that the Mining Claim Rights Restoration Act of 1955 (MCRRA), Pub. L. No. 84-359, 69 Stat. 681, permits entry on lands withdrawn for power development for location and patenting of mining claims, under certain circumstances. But BLM noted that this statute did not retroactively validate claims that were void when located. BLM acknowledged the Additional and Amended Notice, recorded in 1991, but did not further address it.

On August 12, 1998, Buzz Davis filed a "Notice of Appeal and Request for Stay." Davis asserts two arguments. First, he asserts that the 1991 Additional and Amended Placer Location Notice should cure any defects in the original 1937 placer claim notice. (Notice of Appeal at 1-2.) Second, he states that if the original 1937 placer claim was located on lands withdrawn for the powersite, then "the Additional and Amended Placer Location Notice of Bonnie Davis would stand as a Relocation Notice of said placer mining claim, curing the purported defect." (Notice of Appeal at 2.)

Analysis

[1] As to the first issue, we must affirm BLM in its conclusion that the 1937 Minnie Gail placer claim was null and void ab initio. Section 24 of the Federal Water Power Act of 1920, as amended, provides:

> Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the [Federal Power] commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located * * *. [B]efore any lands applied for, or heretofore or hereafter reserved, or classified as

> power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located.

16 U.S.C. § 818 (1994) (emphasis added).

According to Power-Site Classification No. 280, which was established in December 1933: "[I]t is recommended that this classification be given full force and effect under the provisions of the act of June 10, 1920 (41 Stat. 1063)." (Power-Site Classification No. 280 at 2.) With respect to sec. 3, T. 19 N., R. 6 E., Boise Meridian, Valley County, Idaho, Power-Site Classification No. 280 classified as potential powersite lands "[e]very smallest legal subdivision, any portion of which, when surveyed, will be within one-fourth mile of South Fork and East Fork of South Fork of Salmon River." (Power-Site Classification No. 280 at 4.) 1/

Sec. 3 had not been surveyed when the Power-Site Classification was issued in 1933, and the 1937 Notice of Location does not reference the Minnie Gail claim in terms of aliquot subdivisions. Nevertheless, it is clear from the 1937 description that the East Fork of the South Fork of the Salmon River flows roughly through the center of the mining claim, with the claim spanning approximately 650-660 feet on either side of the East Fork. The 1937 mining claim in its entirety thus lay within 1/4 mile of that stream. Accordingly, the record shows that there is no dispute here that the 1933 Power-Site Classification No. 280 covered the same site which Beach and Smith purported to locate as the Minnie Gail placer claim in 1937. 2/

Moreover, it is not disputed that lands withdrawn for powersite entry were withdrawn from location until enactment of the MCRRA, 30 U.S.C. § 621 (1994). Section 24 of the Federal Water Power Act permitted the Secretary of the Interior to, "upon notice * * * declare lands open to location, entry or selection," subject to a reservation of the right of entry for use consistent with the Act. 16 U.S.C. § 818 (1994). However, the record does not indicate that such a declaration or determination was made for the lands within Power-Site Classification No. 280 prior to the

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1/ It is well-settled that the "smallest legal subdivision" is a "quarter quarter section" comprising 40 acres. Carl S. Hansen, 130 IBLA 369, 371 n.2 (1994); Jack J. Grynberg, 106 IBLA 9, 14 (1988), aff'd No. C89-0026-B (D. Wyo. Nov. 6, 1989); Charles Rydzewski, 105 IBLA 9, 13 (1988).

2/ According to the Master Title Plat, all quarter quarter sections within the western half of sec. 3 are within Power-Site Classification No. 280. A 1979 map filed by the Davises shows the Minnie Gail claim to be located within this western half of sec. 3.

1955 passage of the MCRRA. Moreover, the 1990 Master Title Plat shows that Power-Site Classification No. 280 remained in effect through that date. Therefore, it follows that the Classification remained in effect from 1933 through 1955.

It is well settled that a mining claim located on lands which are closed to entry under the mining laws is null and void ab initio. William J. Pepper, 145 IBLA 278, 279 (1998); John C. Heter, 143 IBLA 123, 124 (1998). Under section 24 of the Federal Water Power Act, 16 U.S.C. § 818 (1994), lands classified for use as powersites are closed to mineral entry. See Mackay Bar Corp., 69 IBLA 148, 149 (1982). Any mining claim located on such lands in 1937 was and is null and void. Further, the MCRRA did not retroactively validate the claim. See George L. Hawkins, 66 IBLA 390, 392 (1982); John C. Farrell, 55 IBLA 42, 43-44 (1981); Day Mines, Inc., 65 I.D. 145, 148 (1958).

Davis' argument appears to be that the 1991 Additional and Amended Notice could somehow "cure" the defect in the 1937 notice. Davis' theory is misplaced. It has long been held by this Board that a mining claimant may not amend a void claim. Jon Zimmers, 90 IBLA 106, 110 (1985); Frank Melluzzo, 71 IBLA 178, 182 (1983). Moreover, prior to the time the Davises recorded the "Additional and Amended Notice," BLM adopted regulations which clarify this point. An "amended location" is "a location that is in furtherance of an earlier valid location." 43 C.F.R. § 3833.0-5(p) (1990). The regulation specifies that "[n]o amendment is possible if the original location is void." Id. This regulation remains in effect today.

Accordingly, we affirm the decision of the BLM that the 1937 location of the Minnie Gail mining claim is null and void ab initio. Because the effect of Power-Site Classification No. 280 was to withdraw the lands from location and entry under the general mining laws, the 1937 location by Beach and Smith was never valid.

[2] BLM's decision does not address the second legal issue raised by Buzz Davis, i.e., that the 1991 Additional and Amended Notice may be seen as a relocation. The record makes clear, however, that this is not the case.

Departmental regulations provide that a "relocation" is "the establishment of a new mining claim * * *. A relocation may not be established by the use of an amended location notice, but requires a new original location notice or certificate as prescribed by state law." 43 C.F.R. § 3833.0-5(q). Thus, the filing of an "amendment" is not itself sufficient to establish a relocation. While this regulation does not purport to define in any particular case what is sufficient to constitute "a new original location notice or certificate as prescribed by state law," it makes clear that whatever is required to establish an original location is necessary for a claimant to establish a relocation.

The preamble to the 1988 rulemaking which promulgated this definition confirms this. On the one hand, the preamble states:

> The purpose of the definition is administrative, that is, the definition is intended to assist Bureau employees in determining whether to assign a new serial number to a relocated claim or to retain the serial number on an amended claim while noting the amendment. It is not the intention of the Bureau to decide whether or not claimants have correctly identified their claims as amended or relocated for the purpose of maintaining title under the mining law. The Bureau's intention is to decide in which set of case files the document belongs.

53 Fed. Reg. 48877 (Dec. 2, 1988).

On the other hand, the preamble goes on to note that BLM will not accept "hybrid" filings -- those "which both amend and relocate a claim at the same time" -- because of the difficulties of maintaining parallel files under separate case numbers. Id. Thus, when commenters sought some provision for hybrid filings, BLM stated that the "suggestion is not adopted." Id. "Therefore, a hybrid claim, if submitted, will be treated as if it is an amended notice of location and will be adjudicated in connection with the existing mining claim case file of record." Id.

From this, we construe the rulemaking to have intended to govern the proper interpretation of a "hybrid" notice, such that each such notice will be construed as an amended notice. No such notice could be construed to be a "relocation" unless it also constitutes an original notice as required by FLPMA, 43 U.S.C. § 1744 (1994), and state law.

Precedent of this Board is consistent with this result. Immediately following enactment of FLPMA, this Board concluded that an "'amended' location notice may be considered a relocation of the claim . . . provided no rights of the United States or of third parties have intervened, and the requirements of the law pertaining to relocations by the same claimant have otherwise been met." Walter T. Paul, 43 IBLA 119, 120-21 (1979) (emphasis added). While we find no Board decision that directly interprets BLM's regulatory definition at 43 C.F.R. § 3833.0-5(q), contemporaneous Board precedent holds that, even where the claimant asserts that a notice either amends a prior mining claim notice or constitutes a relocation if the prior notice is void, the relocation must meet all requirements of an original location to be valid. In Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144, 151 (1989), the Board stated that

> the Department would be precluded from construing the * * * notices as original locations if Helit did not record them as original claims within 90 days of the location date as required by [FLPMA], 43 U.S.C. § 1744(b) (1982), and 43 CFR 3833.1-2(a). If Helit failed to record each claim with BLM as an original location including payment of the proper filing fee, such

failure would "be deemed conclusively to constitute an abandonment of the mining claim" under 43 U.S.C. § 1744(c) (1982) and 43 CFR 3833.4.

See Junior L. Dennis, 133 IBLA 329, 334 (1995) (relocation requires abandonment of rights in original claims).

In short, Board precedent and the BLM regulatory definition of "relocation" are consistent in requiring a claimant to choose whether its notice is an amended location or a relocation. If a claimant wishes a notice to be treated as the latter by the Department, the claimant must treat it that way himself. To assert a relocated notice, a claimant must record a "new original location notice" and follow the requirements of state and Federal law in doing so. While an amended notice may be seen as a relocation if these requirements are met, Walter T. Paul, supra at 120-21, a relocation requires that the claimant conform its filings to those of an original location. Melvin Helit, A-Able Plumbing, Inc., supra at 151.

The Davises' actions with respect to the 1991 "Additional and Amended Notice" preclude us from treating it as a relocation. First, Davis argues that "the Additional and Amended Placer Location Notice of Bonnie Davis would stand as a Relocation Notice of said placer mining claim, curing the purported defect." (Notice of Appeal at 2.) To the extent the "defect" referred to by Davis is in the original 1937 Notice of Location, Davis misperceives the nature of "relocation." As described above, it must stand on its own as a "new original location." A relocation cannot relate back to a null and void location any more than an amended location could.

Second, Bonnie Davis' actions in 1991 do not sustain Buzz Davis' argument now that the Additional and Amended Location was meant to conform to the requirements of a relocation. Under section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1994), the Davises were required to file with BLM, "within 90 days after the date of location" of a claim located after 1976, a copy of the official record of the notice of location. The 1991 "Additional and Amended Notice" identifies the date of location as "August 18, 1937." Davis simply cannot square this assertion, which is made for purposes of an amended location, with the notion that the Minnie Gail was newly located in 1991. Yet, this notion is critical to any construction of the document as a "relocation." The Davises' actions do not suggest any intention to comply with FLPMA's requirements for the recordation of a new claim. Thus, the filing does not comply with FLPMA section 314(b).

Moreover, according to the 1991 Additional and Amended Notice, Bonnie Davis paid a $5 fee with her filing. The regulations effective in 1991 (and now) required a claimant to pay a $10 fee with any recordation of a new mining claim. 43 C.F.R. § 3833.1-3(b) (1990). Under 43 C.F.R. § 3833.1-4(b) (1990), a failure to submit the proper fees would result in BLM's refusing to accept a recordation filing and returning it to the claimant/owner.

While, presumably, the Davises could have timely cured the defect by paying the correct fee, the significance of this is that both the BLM and the Davises treated the 1991 Additional and Amended Notice as an amended notice and not a relocation. Davis cannot sustain his claim that either BLM should have construed the 1991 document, or this Board should now construe it, as the relocation it was never meant to be. The Davises' failure to comply with statutory requirements for filing under section 314(b) of FLPMA would have constituted abandonment of any new mining claim as of that date. 3/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's decision dated July 17, 1998, is hereby affirmed, and the Request for Stay is denied.

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Lisa Hemmer
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge

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3/ The Master Title Plat also shows that a significant portion of the northern part of the Minnie Gail claim, as identified in the 1991 "Additional and Amended Notice," conflicts with a United States Forest Service withdrawal. Public Land Order No. 2575 effected a "Withdrawal of Lands for Use of the Forest Service as Recreation Areas," and was published on Jan. 4, 1962, at 62 Fed. Reg. 120. Accordingly, these lands are subject to Public Land Order No. 2575, and would not have been open to location in 1991, or any time after 1962. Because this decision affirms BLM's decision as to the entire Minnie Gail mining claim, we do not further address the portion of it subject to the Forest Service withdrawal.